

REMARKS

Applicants appreciate the courtesies extended by Examiner Lien Tran during an interview on July 13, 2005 with Applicant's attorney, Jeffrey A. Wolfson. The comments appearing herein are substantially in accord with those presented and discussed during the interview.

Claims 1-25, as amended, are pending for the Examiner's review and consideration. Based on a concern in the Office Action that the term "handled" may contradict the claim language without further manipulation, claims 1, 7, and 10 have been amended to more clearly recite simply that the bar has sufficient firmness to retain its shape without breaking until it is placed directly in the baking pan, as that is the only handling recited in the claimed invention. Claims 1, 7, and 10 have also been amended to clarify that the bars of the invention do not have groove or score lines defining separable pieces of the dough bar (*See, e.g.*, Specification in FIGS. 1-5; at page 4, lines 9-13 stating that the bar or block may have a periphery that is round, oval, or that corresponds to a triangle or other polygon; at page 7, lines 14-18 stating that if desired the bar must be *cut* rather than being separated because it does not contain pre-defined grooves or score lines). No new matter is believed to have been introduced by any of the amendments herein, such that entry of the claims is warranted at this time.

Claims 1-3 were rejected under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 6,551,640 to Drantch et al. ("Drantch") for the reasons set forth on page 2 of the Office Action, which references the prior Office Action. Drantch is stated to disclose a dough and a method of making fresh baked products from the dough. The dough is purportedly prepared into finished baked goods by simple addition to a suitable baking container or pan and baking to form a finished baked good. The Office Action concedes, however, that Drantch does not disclose providing the dough in the form of a bar, as recited in claim 1. Drantch also does not disclose the shape and sizes recited in claims 2-3.

Drantch is directed to shelf-stable dough for baked goods wherein fat-bearing pieces that are dispersible within the dough, such as chocolate chips, resist softening by depression of melting point within the dough (Col. 1, lines 6-9). Drantch is primarily concerned with the interaction between chocolate chips in a cookie dough or other type of dough, and the various fats in the dough (Col. 2, lines 40-43). Drantch does generally disclose—in part—that the "doughs are conveniently prepared into finished baked goods by simple addition to a suitable baking container or pan and baking to form a finished baked good" (Col. 11, lines 21-25).

At best, however, this language must be taken in the context of the teaching of Drantch *as a whole*, which teaches that “the edible doughs can be held and *shaped* by hand without the dough sticking to hands or fingers. The edible doughs are usable as edible clay by children” (Col. 6, lines 59-62). This refers to the “dry mix” type of doughs taught by Drantch, as clearly the “batter” dough is too runny and pourable (Col. 4, lines 52-60) to possibly retain its shape, as presently recited. Yet another teaching by Drantch is that the doughs should be *performed in a baking tray specific to the desired type of final baked product* (Col. 12, lines 6-8), which again teaches that the dough must be manipulated or shaped by hand as noted above. Contrary to the Office Action, which states on page 2 that “[t]here is no disclosure of forming or shaping,” Drantch as a whole clearly and expressly teaches forming or shaping *by hand* and expressly includes at least two passages discussing such forming or shaping as discussed above. Indeed, claims 5 and 6 of Drantch also state that the dough is shaped before addition to the container (as in the “preforming” embodiment noted above where the container must match the shape or the dough will not retain its shape as presently recited) or it is shaped after removal from the container (*e.g.*, with manipulation of the dough). Indeed, the specific doughs taught by Drantch differ from those presently recited, and additional discussion below is devoted to claims 7 and 14 and their specific differences. But claim 1 already recites that the bars of the present invention retain their shape without breaking until being placed in a tray for baking, *i.e.*, before it is placed in the baking tray, and that this is done without manipulation of the dough. Therefore, Drantch cannot teach the presently recited invention when considering either its dry mix embodiment or its batter embodiment.

Moreover, Drantch relates mainly to the preparation and baking of cookies and ready-to-bake cookie doughs (Col. 3, lines 26-33). Cookies are generally prepared by spooning and dropping small portions of cookie dough onto a baking sheet, at suitable distance from one another, and then baking to form individual-sized, distinct cookies (*See, e.g.*, the Declaration of Merrie Martin at ¶ 7, Under 37 C.F.R. § 1.132 (“the Martin Declaration”) submitted previously). One of ordinary skill in the art would therefore have had no motivation to form the cookie dough of Drantch into a solid, monolithic bar (*Id.*). In the other embodiment of Drantch, the doughs are preformed to the desired shape of the final product, such that they do not retain their shape on their own, as presently recited. Rather, those products are preformed in a baking tray shaped the same as the final products desired. Moreover, it is well known that baking a large block of cookie dough would not have provided the desired dual texture of crispness on the outer edges and chewiness in the center

that is typically desired for cookies, such as taught by Drantch (*Id.*). Drantch therefore did not provide one of ordinary skill in the art with a reasonable expectation of success in using its dough in the form of a bar (*Id.*).

In the obviousness context, a motivation must have existed for one of ordinary skill in the art to combine the references--and this lack of such a motivation in the art of record demonstrates the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office. *In re Lee*, 277 F.3d 1338, 61 U.S.P.Q.2d 1430 (Fed. Cir., 2002) (finding that the Board of Patent Appeals and Interferences improperly relied upon common knowledge and common sense of person of ordinary skill in art to find invention of patent application obvious over combination of two prior art references, since factual question of motivation to select and combine references could not be resolved on subjective belief and unknown authority). Absent the motivation to provide bars as presently recited, one of ordinary skill in the art would not have formed the cookie dough of Drantch into a solid, monolithic bar that retained its shape without breaking until being placed in a baking tray.

Even if a *prima facie* case of obviousness had been made on the record, however, one of ordinary skill in the art would have readily understood that, if the dough of Drantch was not flowable or pourable, additional manipulation or other measures, such as spooning, shaping, dropping, and spacing the dough onto to the baking pan is required to achieve a dough product that is ready to be baked (Martin Declaration, ¶¶ 6-7). This is particularly clear when reviewing Drantch as a whole, because Drantch clearly discloses that its "edible doughs can be held and shaped by hand" (Col. 6, lines 60-61) and it clearly discloses that the dough must be *performed in a baking tray specific to the desired type of final baked product* (Col. 12, lines 5-7). Thus, Drantch clearly teaches that efforts are required to shape its dough into desired shapes, using desired amounts, and then placed into a desired position on the baking tray being used for the desired type of baked product (Martin Declaration, ¶ 6). At best, the passage noted in the Office Action about "simple placement" requires pre-shaping of the dough and retention in a container specific to the desired type of final baked product, while a bar prepared according to the claimed process retains its shape until placement—without dough manipulation.

Importantly, the doughs enabled by Drantch in its examples are different than the dough recited in claims 7 and 10, as well as dependent claims 4-5. Independent claims 7 and 10, and claim 4, each recites that starch is present but the starch is less than 3% by weight of cold swelling starch based on the weight of the dough, which cannot be taught by Drantch

in that it only includes starch as a minor component in its sugar (Col. 7, lines 44-46) but does not teach the separate inclusion or use of starch. Drantch fails to teach the benefits to its dough composition of including a particular type of starch. Independent claim 7, and various dependent claims as noted, each additionally further recites several components that are different from Drantch. For example, Drantch's examples 1-2 teach only 25% and 35% flour, respectively, in the base dough. On the contrary, claims 7 and 14 recite flour in an amount of about 5 to 20%. Indeed, Drantch expressly discloses that flour must be present in about 25 to 45% of the dough, which teaches away from the lower amounts of flour presently recited in these claims. Also, claims 5, 7, 14, and 25 each recites an emulsifier present in specific amounts, *e.g.*, of about 0.1 to 2% or about 0.3 to 0.75%, which are not seen to be disclosed or suggested by Drantch. Yet another difference is that Drantch's formulations fail to teach egg, egg white or an egg substitute in an amount of 9 to about 15%. Rather, Drantch teaches 4-7 percent eggs in Examples 2-3, although it does mention "white eggs" in an amount up to 8% in Example 2, which still fails to teach a higher amount of 9 to 15% eggs, as presently recited in claims 7 and 14. Moreover, Drantch fails to teach the addition of excess water, preferring instead to rely on the liquid present in the eggs.

Thus, Drantch fails to disclose or suggest various important features of the claimed dough, as recited in claims 7 and 14 in particular, as well as other claims in part. In particular, Drantch fails to teach: (a) the particular starch or separate inclusion thereof aside from its presence in sugar; (b) the amount of flour; (c) an emulsifier present in specifically recited amounts; (d) egg, egg white or an egg substitute in an amount of 9% to about 15%; and (e) the addition of excess water; each of which is recited in claims 7 and 14, as well as one or more being recited in other claims as well. While the modification of one or even two of these may be construed as "mere optimization," it should be apparent that the combination of all these differences recited in claims 7 and 14 provides the surprising and unexpectedly different dough of the invention.

In addition, Drantch does not disclose or suggest a method for preparing a dough bar that is baked to produce a final fresh dough product that is not collapsed in the center of the pan after baking, as recited in claim 1 (Martin Declaration, ¶ 7). Because the doughs of Drantch differ from those of the present invention, it would not have been expected that Drantch's products would inherently have the same characteristics. Indeed, because Drantch is directed to cookie doughs, these are not typically suitable for forming bars as presently recited. Indeed, the methods of the present invention provide a bar product while avoiding such a collapsed center, as presently recited (*Id.* at ¶ 5).

As can be readily seen, Drantch does not disclose or suggest a method of making a fresh baked product where the consumer simply and elegantly removes the dough bar, *i.e.*, dough portion that is already pre-measured and pre-shaped, from a package and places the bar directly in a baking pan without further dough manipulation to produce a baked product that is not collapsed in the center of the pan after baking. Rather, Drantch teaches away from the claimed invention by requiring that the doughs be formed according to the specific type of final dough product desired. Accordingly, Applicants respectfully request that the rejection of claims 1-3 under 35 U.S.C. § 103(a) be reconsidered and withdrawn, as no *prima facie* case of obviousness has been shown on the record--particularly in view of the Martin Declaration.

Claims 1-25 were rejected under 35 U.S.C. § 103(a) as obvious over International Publication No. WO 01/06858 to Blaschke et al. ("Blaschke") for the reasons set forth on page 2 of the Office Action, which simply refers to the reasons stated in the previous Office Action mailed June 30, 2004. The Office Action states that Blaschke discloses a ready-to-use bakery dough product that is formed in the shape of a block, and that the block is broken into pieces either before or after baking.

Blaschke discloses a dough, particularly for brownie preparation, that is provided as a sheet with score lines defining pieces of dough that are broken off to form individual brownies or other dough products, placed in a baking pan in spaced relation and then baked into separate brownies or other dough products (Page 1, lines 28-36 to Page 2, line 16). The Office Action takes the position that it would be obvious and desired not to break apart the pieces of Blaschke before baking, but rather it is mere choice to wait to do so until after being baked "because a cooked dough is easier to manage than a raw refrigerated dough" (Office Action at page 3, first full paragraph).

On the contrary, the claimed embodiment now recites that the bars do not have groove or score lines defining separable pieces of the dough bar, *i.e.*, the bars do not have groove or score lines that delineate pieces to be broken off. Rather, separate pieces must be cut off if desired, as noted in the specification (page 7, lines 14-18). Indeed, in each of the FIGS. and the entire description of the invention including the examples, there is nothing to indicate groove or score lines are desired—because they are not contemplated. Rather, the claimed invention relates to methods and place and bake dough bars that are placed without manipulation in a baking tray. Blaschke, however, expressly *teaches away* from the claimed invention by disclosing that its doughs are *first* separated along grooves or score lines and then individually placed for cooking (*See* Abstract; page 1, line 35 to page 2, line 3 and lines

8-16; page 3, lines 24-27 and lines 33-36, page 4, lines 3-6; page 6, lines 34-36; page 7, lines; Examples 1-3; and FIGS. 1-5). Blaschke clearly discloses a dough structure having numerous grooves or score lines, while the presently recited invention excludes such grooves or score lines to more clearly and distinctly recite the claimed invention. Moreover, Blaschke also teaches that—even when a bar or cake is desired—the pieces are to be separated join together during baking but with lines to facilitate separation that are created during baking by the joining of the pieces (page 1, line 35 to page 2, line 3). Thus, not only does the reference contain no motivation to avoid separating pieces before baking, as suggested by the Office Action, but rather Blaschke expressly teaches that there is an advantage to be gained by separating the pieces. Applicants also point to the Martin Declaration at ¶ 8 regarding these teachings of Blaschke and the motivation and expectations one of ordinary skill in the art obtains from that reference, *i.e.*, to break pieces of the block apart along grooves or scores before baking.

Additionally, the presently recited dough bar is not broken into separate pieces before baking. Rather, the dough bar is placed directly into the baking pan without further dough manipulation once it is taken from its package. Although not as complicated as measuring and shaping the dough portions of Drantch from a reservoir of dough, the breaking and spaced placement of Blaschke's dough pieces takes some time and care by the consumer in order to obtain a suitable final dough product. The claimed methods, on the other hand, surprisingly and unexpectedly provide baked dough bars and methods of providing the same with a chewier center as the result of baking an entire block that is not separated into smaller pieces (Martin Declaration, ¶ 8). Nothing in Blaschke suggests or remotely motivates one of ordinary skill in the art to bake an entire block of dough (*Id.*). Accordingly, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, as no *prima facie* case of obviousness has been shown on the record--particularly in view of the Martin Declaration.

Accordingly, the entire application is now in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree with the Applicants' position, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

Respectfully submitted,

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